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No. 06-1550

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CATHOLIC CHARITIES OF
THE DIOCESE OF ALBANY, *et al.*,

Petitioners,

v.

ERIC R. DINALLO, SUPERINTENDENT,
NEW YORK STATE INSURANCE DEPARTMENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), forecloses employers' free exercise challenge to a state insurance law that regulates the content of group health insurance plans, where the insurance law is generally applicable and does not target religion?

TABLE OF CONTENTS

Page

Counterstatement of Question Presented i

Table of Contents ii

Table of Cited Authorities iii

Statement 1

Reasons for Denying the Petition 6

Conclusion 20

TABLE OF CITED AUTHORITIES

Page

CASES

Abood v. Detroit Bd. of Educ.,
431 U.S. 209 (1977) 14

Boy Scouts of America v. Dale,
530 U.S. 640 (2000) 15-16

Catholic Charities v. Superior Court,
32 Cal. 4th 527 (Cal. 2004), *cert. denied*,
543 U.S. 816 (2004) 6

Church of the Lukumi Babalu, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 6, 7, 8, 18

City of Cleburne v. Cleburne Living Center, Inc.,
473 U.S. 432 (1985) 19

Civil Liberties for Urban Believers v. City of Chicago,
342 F.3d 752 (7th Cir. 2003) 10

Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos,
483 U.S. 327 (1987) 7

Employment Div., Dep't of Human Resources v. Smith,
494 U.S. 872 (1990) ..... *passim*

Fifth Ave. Presbyterian Church v. City of New York,
293 F.3d 570 (2d Cir. 2002). 19

General Council on Fin. and Admin. of the United Methodist Church v. Superior Court,
439 U.S. 1369 (1978) (order denying stay) 17

Cited Authorities

Page

Grace United Methodist Church v. City of Cheyenne,
451 F.3d 643 (10th Cir. 2006) 18

Griswold v. Connecticut,
381 U.S. 479 (1965) 10

Hurley v. Irish-American Gay, Lesbian & Bisexual Group,
515 U.S. 557 (1995) 11, 12

Johanns v. Livestock Mktg. Ass'n,
544 U.S. 550 (2005) 14

Jones v. Wolf,
443 U.S. 595 (1979) 17

Keller v. State Bar,
496 U.S. 1 (1990) 14

Larson v. Valente,
456 U.S. 228 (1982) 6

Metropolitan Life Ins. Co. v. Massachusetts,
471 U.S. 724 (1985) 16

Miller v. Reed,
176 F.3d 1202 (9th Cir. 1999) 10

N.Y. State Club Ass'n, Inc. v. City of New York,
487 U.S. 1 (1988) 7

NLRB v. Catholic Bishop of Chi.,
440 U.S. 490 (1979) 18

Cited Authorities

Page

PruneYard Shopping Center v. Robins,
447 U.S. 74 (1980) 13

Romer v. Evans,
517 U.S. 620 (1996) 19

Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,
547 U.S. 47, 126 S.Ct. 1297 (2006) ..... *passim*

San Jose Christian College v. City of Morgan Hill,
360 F.3d 1024 (9th Cir. 2004) 18-19

Serbian Eastern Orthodox Diocese v. Milivojevich,
426 U.S. 696 (1976) 17

Sherbert v. Verner,
374 U.S. 398 (1963) 9

State v. Green,
2007 UT 76 (Utah 2004) 19

Swanson By and Through Swanson v. Guthrie Indep. Sch. Dist. No. I-L,
135 F.3d 694 (10th Cir. 1998) 10

Tony & Susan Alamo Found. v. Secretary of Labor,
471 U.S. 290 (1985) 17

United States v. Lee,
455 U.S. 252 (1982) 17

Cited Authorities

Page

United States v. O'Brien,
391 U.S. 367 (1968) 10, 11

Walz v. Tax Comm'n of the City of New York,
397 U.S. 664 (1970) 7

STATUTES

N.Y. Ins. Law § 3221(l)(16) 1, 2

N.Y. Ins. Law § 4303(cc) 1, 2

Act of September 17, 2002, ch. 554,
2002 N.Y. Laws 3458 1

STATEMENT

1. The New York Legislature enacted the Women's Health and Wellness Act ("WHWA")[1] in 2002 to redress persistent gender inequities in health insurance coverage and expand access to vital preventive healthcare. (Pet. App. 2a, 71a).[2] The Act requires group health insurance policies issued within New York State to provide health insurance coverage for a variety of services needed by women, including obstetric and gynecologic care, periodic mammography, cervical cytology screening, bone density tests and treatment, and if prescription drug coverage is included, the cost of prescription contraceptive drugs and devices. (Pet. App. 2a, 19a, 70a).

The Legislature was provided with extensive information demonstrating the need for the legislation, including the provision relating to contraception. (Pet. App. 2a). *See* N.Y. Ins. Law §§ 3221(l)(16), 4303(cc). It concluded that the WHWA was necessary to ensure women's access to essential healthcare services, and "would provide women with healthcare coverage equivalent to men's." (Pet. App. 71a).

The Legislature sought to advance its compelling interest in gender equity and women's health while accommodating the beliefs of religious organizations. It did so by providing a statutory exemption for "religious employers" that permits them to request a group policy without contraceptive coverage if contraceptive use is contrary to the tenets of their faith. N.Y. Ins. Law §§ 3221(l)(16)(A), 4303(cc)(l). When a religious employer invokes the exemption, the insurer

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1. Act of September 17, 2002, ch. 554, 2002 N.Y. Laws 3458.

2. "Pet." refers to the Petition for Writ of Certiorari in this case; "Pet. App." refers to the Appendix to the Petition; "R." refers to the record filed with the New York Court of Appeals.

must offer individual employees the opportunity to purchase contraception coverage at their own expense "at the prevailing small group community rate." *Id.* §§ 3221(l)(16)(B)(I), 4303(cc)(2)(A). The Act defines a "religious employer" as an entity for which each of the following is true:

> (a) The inculcation of religious values is the purpose of the entity.
>
> (b) The entity primarily employs persons who share the religious tenets of the entity.
>
> (c) The entity primarily serves persons who share the religious tenets of the entity.
>
> (d) The entity is a non-profit organization as described in Section 6033(a)(2)(A)i or iii, of the Internal Revenue Code of 1986, as amended.

Id. §§ 3221(l)(16)(A)(1), 4303(cc)(1)(A).

2. Petitioners are ten organizations or corporations affiliated with the Roman Catholic Church or the Baptist Bible Fellowship who object to the contraception coverage provision in the WHWA. (Pet. App. 3a). Petitioners provide social and educational services to the general public, including immigration resettlement programs, affordable housing programs, job development services, domestic violence shelters, healthcare facilities, disaster relief programs, job placement and homeless services, and schools. (Pet. App. 4a, 69a). The religious tenets of petitioner organizations hold some or all forms of contraception to be sinful, and require petitioners "to provide their employees with reasonable compensation and a decent standard of

living, which they contend includes providing health insurance including prescription drug coverage." (Pet. App. 69a).

It is uncontested that nine of the petitioners do not quality for the WHWA's religious employer exemption for one or more reasons.[3] Some do not have the inculcation of religious values as their purpose. Some do not primarily employ persons who share their religious tenets. None of the petitioners serve primarily persons who share their religious tenets. And only three qualify under the designated Internal Revenue Code provision. (Pet. App. 4a).

3. Dissatisfied with the statute the New York Legislature chose to enact, petitioners filed an action for declaratory and injunctive relief in New York Supreme Court, Albany County. Petitioners asserted that the provision as applied to them violates their Free Exercise Clause, Establishment Clause, and freedom of speech and association rights under the federal and state constitutions, their right to equal protection under the federal constitution, and their rights under certain state statutes. (Pet. App. 90a).[4]

By order dated November 25, 2003, the New York trial court denied petitioners' motion for injunctive relief and granted the State's motion for summary judgment, dismissing all claims. (Pet. App. 67a-91a). Petitioners appealed, and the Appellate Division and Court of Appeals both affirmed. (Pet. App. 1a-15a, 18a-66a).

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3. The tenth petitioner, the Servants of Relief for Incurable Cancer, applied for and was granted an exemption while this case was pending, *see* Pet. 8 n.5 (R. 1482-90), and thus no longer has standing to pursue this action.

4. At this stage, petitioners assert only their free speech and association and free exercise claims under the federal constitution. (Pet. 11-27).

In a unanimous decision, the New York Court of Appeals held that *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), barred petitioners' federal free exercise claim. As the court explained, *Smith* unambiguously established that "'the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (Pet. App. 5a (quoting *Smith*, 494 U.S. at 879)). The court went on, "where a prohibition on the exercise of religion 'is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.'" (Pet. App. 6a (quoting *Smith*, 494 U.S. at 878)).

Smith foreclosed petitioners' free exercise challenge to the contraceptive coverage provision, the court held, because the WHWA is a neutral law designed not to target religion, but to expand the insurance coverage available to women. The court rejected petitioners' argument that the religious employer exemption rendered the WHWA not neutral. It explained that the neutral purpose of the challenged provision – to improve women's health and eliminate gender inequity – is not altered simply because the Legislature also sought to accommodate religious practice. (Pet. App. 6a).

The court also rejected petitioners' attempts to find an exception to *Smith* that would save their claim. The court assumed, without deciding, that petitioners' so-called "hybrid-rights" exception to *Smith* could state a cognizable First Amendment claim. Their hybrid rights theory would hold that a neutral, generally applicable law can nonetheless be deemed unconstitutional as applied to a religious practice where a First Amendment principle in addition to free exercise is at stake. But the court refused to apply such a doctrine to invalidate the law at issue here, because petitioners had not alleged any plausible First Amendment

violation beyond their free exercise claim. It found petitioners' free speech and association claims to be "insubstantial," since the WHWA "does not interfere with [petitioners'] right to communicate, or to refrain from communicating, any message they like; nor does it compel them to associate, or prohibit them from associating, with anyone" they chose. (Pet. App. 8a (citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 126 S.Ct. 1297 (2006) ("FAIR")).

The court went on to reject petitioners' attempt to avoid *Smith* through reliance on the church autonomy doctrine. The court held that "church autonomy" was not at issue because the WHWA does not involve the State in deciding internal matters of church governance or ecclesiastical questions; it merely regulates one aspect of the employment relationship between petitioners and their lay staff without deciding whom a church will employ to carry out its religious mission. (Pet. App. 8a-9a).

The court also rejected petitioners' state constitutional claims, finding that the WHWA satisfied even the more rigorous scrutiny applicable under the state free exercise clause. (Pet App. 9a-14a). In order to satisfy the free exercise clause of the New York State Constitution, a law must not interfere unreasonably with a plaintiff's right to practice his religion. (Pet. App. 10a, 13a). Here, in balancing the religious infringement against the State's interest in women's health and gender equity, the court emphasized that "the WHWA does not literally compel [petitioners] to purchase contraceptive coverage," since the contraception coverage provision applies only if petitioners voluntarily choose to offer prescription drug benefits to their employees. (Pet. App. 13a). While petitioners may have a religious obligation to provide just wages and benefits to their employees, the court pointed out that "[i]t is surely not impossible, though it may

be expensive or difficult to compensate employees adequately without including prescription drugs in their group health care policies." (Pet. App. 13a).

Finally, petitioners' Establishment Clause challenge to the religious employer exemption failed because, unlike in *Larson v. Valente*, 456 U.S. 228 (1982), the exemption here did not, nor was it designed to, favor one religious denomination over another. The WHWA was held to be generally applicable and neutral between religions. (Pet. App. 14a).

REASONS FOR DENYING THE PETITION

Petitioners urge this Court to grant a writ of certiorari to "clarify" its holding in *Smith*, 494 U.S. 872, and *FAIR*, 126 S.Ct. 1297, but there is nothing to clarify. The state court's straight-forward application of *Smith* to dismiss petitioners' free exercise challenge to the neutral and generally applicable insurance law breaks no new ground. The free speech doctrines petitioners invoke have no application here because the insurance law regulates conduct, not expression. The standard applied in *Smith* was subsequently reaffirmed by this Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993), and the decision below does not present a split among the courts of appeals or a conflict with the decisions of other state courts. Indeed, the one other state court to have considered a free exercise challenge to a similar law also rejected it, on the same grounds as the court below. *See Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527 (Cal. 2004), *cert. denied*, 543 U.S. 816 (2004). Accordingly, further review is unwarranted.

In *Smith*, this Court unambiguously held that the Free Exercise Clause permits evenhanded enforcement of general,

neutral laws, even if the laws have the incidental effect of burdening particular religious practices. 494 U.S. at 883-84, 890. The court below correctly determined that the WHWA is such a general and neutral law. (Pet. App. 6a-7a). The WHWA applies to petitioners not as result of their "religious beliefs" or "religious motivation," *Church of the Lukumi Babalu Aye*, 508 U.S. at 533-34, but because petitioners employ workers and offer group health insurance benefits like other non-exempt organizations. (Pet. App. 4a, 6a, 13a).

Petitioners do not challenge the neutrality or general applicability of the WHWA for purposes of seeking a writ of certiorari.[5] Rather, they ask this Court to set aside its now

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5. Petitioners in a footnote question the neutral and general character of the WHWA because the contraception coverage mandate applies only to prescription drug plans and not to all group health insurance plans, and because it contains an exemption for religious employers. (Pet. 24 n.16). Petitioners are mistaken. The contraceptive coverage provision applies generally to every group prescription drug plan in the State unless the employer can claim the "religious employer" exemption, and the exemption is neutral because it does not target or distinguish among religions.

The Court has on more than one occasion upheld religious exemptions -- like the one employed in the WHWA – that do not distinguish among religions and serve the secular purpose of lessening the burden on religious practice. It has found such religious accommodations to satisfy both Establishment Clause and equal protection scrutiny, which implies the neutrality of such laws. *See, e.g., Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335-36, 338-39 (1987) (upholding Title VII's exemption for religious organizations; the provision is neutral on its face and has a secular purpose to accommodate religion); *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 18 (1988) (upholding an exemption to a state nondiscrimination law for religious corporations); *Walz v. Tax Comm'n*, 397 U.S. 664, 679, 672-73 (1970) (upholding a state

(Cont'd)

well-settled holding in *Smith* and apply a higher standard of constitutional review to their free exercise claim than *Smith* affords. In support of their claim, they invoke a laundry list of First Amendment doctrines which have no proper application to this case.

1. Petitioners first urge this Court to resolve a purported split in the Circuits as to whether to recognize a unique "hybrid" First Amendment claim stemming from an infringement on both religious practice and speech. Petitioners argue that language in *Smith* laid the foundation for such a hybrid claim, meriting strict scrutiny, rather than the more limited review prescribed by *Smith* for neutral, general laws that burden religion. (Pet. 19-20). Petitioners claim that this case presents an appropriate vehicle for considering such a claim, because the New York insurance law at issue here allegedly infringes not only their free exercise rights, but their free speech and association rights as well.

But there is no cause for this Court to review petitioners' "hybrid" claim in this case, for several reasons. First, there is no genuine Circuit split on the issue; while some courts of appeals have suggested that they would recognize such a hybrid rights claim in a proper case, not a single circuit court decision cited in the Petition (Pet. 19-20 & n.12), has actually done so. Nor does any decision of this Court following *Smith* even remotely suggest that such a hybrid claim exists. *Cf. Church of the Lukumi Babaly Aye*, 508 U.S. at 566-67 (Souter, J., concurring) (rejecting hybrid-rights hypothesis as "untenable").

(Cont'd)

property-tax exemption for religious organizations operating property for exclusively religious purposes). To the extent petitioners complain that the religious exemption in the WHWA is too narrow, this Court has directed such complaints to the political process. *See, e.g., Smith*, 494 U.S. at 890.

Smith referred to the so-called "hybrid rights" cases merely to emphasize that the free exercise standard applied in *Smith* was not novel, but had been consistently applied by the Court in the past. In repudiating the strict scrutiny test of *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court in *Smith* distinguished several of its prior decisions that seemed to apply that standard to free exercise claims. The Court explained that

> [t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.

Smith, 494 U.S. at 881. That language does not purport to create a special category of hybrid claims, but rather notes that in the case of a neutral generally-applicable law burdening religion, it is only a free speech claim and not a free exercise claim that will trigger strict scrutiny. The facts of *Smith*, the Court observed, did "not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right." *Id.* at 882.

2. Nor does this case involve communicative activity. Thus, even if there were uncertainty as to the meaning of the hybrid-rights language in *Smith*, this case would still be an ill-suited vehicle for its resolution since petitioners have not presented a colorable companion free speech claim. Even those Circuits that purport to recognize a doctrine of hybrid rights have categorically rejected constitutional challenges in the circumstances of this case, when a plaintiff merely combines "a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right."

Miller v. Reed, 176 F.3d 1202, 1208 (9th Cir. 1999); *see also Civil Liberties for Urban Believers, Christ Ctr. v. City of Chicago*, 342 F.3d 752, 765 (7th Cir. 2003); *Swanson By and Through Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998).

Petitioners agree that compliance with a law regulating healthcare benefits is not speech. (Pet. 16). The WHWA affects what a health insurance plan must cover, or what an employer must do, and not what an employer or anyone else must say. Nor does the WHWA regulate expressive or symbolic conduct. Only conduct that is "inherently expressive" is extended protection under the First Amendment's Free Speech Clause. *See FAIR*, 126 S.Ct. at 1310 (citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). Providing a health insurance policy is not inherently expressive, because petitioners' views about any of the multitude of prescription drugs and treatments covered by the policy cannot be known absent explanatory speech. *See FAIR*, 126 S.Ct. at 1310-11. Nor can the employee's use of prescription contraceptives be considered communicative activity, particularly since the Court has recognized the intrinsically private nature of that act. *See Griswold v. Connecticut*, 381 U.S. 479 (1965). Indeed, because contraceptive drugs can be prescribed for medical purposes other than contraception, it is impossible to draw any conclusion about an employer's views of contraception from the fact that its health plan covers these drugs.

Petitioners ignore these fundamental distinctions between expressive activity and conduct and attempt to "stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect." *FAIR*, 126 S.Ct. at 1313. Petitioners invoke three speech doctrines: compelled speech, compelled subsidization, and compelled association. For each, they make essentially the same claim – that the

WHWA compels them to endorse contraception contrary to the tenets of their faiths.

It does not. Petitioners assert that by providing insurance coverage for contraceptive drugs, they are communicating a message of endorsement or approval, but that claim is simply false. An employer who provides employees with health coverage for prescription drugs is not thereby expressing approval of every medication or treatment used by the employees; this would be so even in the absence of legal compulsion, and it is especially clear when the coverage is provided under compulsion.

This Court corrected the mistake petitioners make here as early as *O'Brien*, when it rejected the view that "conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." 391 U.S. at 376. Its decision in *FAIR* last year reiterates this distinction between conduct and expression and summarizes each of the speech doctrines on which petitioners rely. That comprehensive decision squarely forecloses all of petitioners' speech arguments. Because there is no communicative activity here, the hybrid-rights theory is irrelevant, and this case is indisputably governed by a straight-forward application of *Smith*.

a. Petitioners argue that the WHWA compels them to endorse their employees' contraceptive use, contrary to their own religious views, calling this compelled speech. They rely on *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995) (Pet. 14, 18), which barred application of a state nondiscrimination law to require parade organizers to include a group of gay marchers who would impart a message the organizers did not wish to convey. Petitioners imply that providing health insurance that pays for a drug they oppose is analogous to holding a parade that

contains a contingent of marchers they reject, but there is no comparison.

A parade, *Hurley* held, is more than just persons marching from one point to the next. *Hurley*, 515 U.S. at 568. It is a group of marchers making a collective point, both to each other and to the bystanders along the way. *Id.* As such, a parade can be a form of protected expression, not unlike a protest march. *Id.* This Court was careful to point out that it was not the sexual orientation of the individual marchers in the parade that would have been compelled speech, but the message the gay parade-contingent intended to express in the parade. *Id.* at 570, 572. But as discussed above, the provision of health insurance is not an expressive activity like a parade. Thus, *Hurley*'s compelled-speech doctrine has no application here.

Moreover, even if compliance with the WHWA did convey a message without the need for explanatory speech, which it does not, there is little chance that the message would be identified with petitioners. Petitioners' compelled endorsement claim is similar in all relevant respects to the endorsement claim rejected by this Court in *FAIR*, and therefore presents no claim warranting this Court's review. *See* 126 S.Ct. at 1302-03.

In *FAIR*, an association of law schools challenged a federal law, known as the Solomon Amendment, 10 U.S.C. § 983 (Supp. 2005), that denied federal funding to schools unless they offered equal access to military and nonmilitary recruiters. The association argued that forcing its member schools to allow military recruiters on campus violated their freedom of speech by, among other things, compelling the law schools to endorse the military's position on homosexuality, with which it disagreed. *FAIR*, 126 S.Ct. at 1302-03.

This Court rejected that argument. *Id.* at 1310. It found little likelihood that the views of the recruiters would be associated with the law schools who hosted them on campus. As the Court explained, "[n]othing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies." *Id.* The court relied on its earlier decision in *Prune Yard Shopping Center v. Robins*, which upheld a state law requiring a shopping center owner to allow certain expressive activities by others on its property because "there was little likelihood that the views of those engaging in the expressive activities would be identified with the owner, who remained free to disassociate himself from those views and who was 'not . . . being compelled to affirm [a] belief in any governmentally prescribed position or view.'" *FAIR*, 126 S.Ct. at 1310 (quoting *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980)).

The claim of compelled endorsement here fails for the same reason that defeated the claim in *FAIR*. Like the law school compelled to provide space for military recruiters, the employer compelled to provide health insurance coverage for contraceptives is not thereby compelled to endorse any message. As with providing space for military recruitment, nothing about the provision of employee health insurance suggests that petitioners endorse the particular choices made by their employees in using their benefits, or the private reproductive choices made by their employees.[6]

6. If petitioners' theory of endorsement were correct, then every employer who objected to medication or treatment obtained by its employees, and paid for even in part by employer-provided health insurance, could raise a free speech "endorsement" claim cognizable under the First Amendment. Such objections could include matters as routine as vaccinations, as critical as blood transfusions, or as controversial as stem-cell treatments. The claim could potentially be made even for objections that have no basis in religion. The potential for litigation over the details of health insurance coverage would be limitless.

Petitioners remain free to express their views about contraception, and can disassociate themselves from both the government's mandate and their employees' conduct. Just as "high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so," *FAIR*, 126 S.Ct. at 1310, petitioners' employees and the public at large can distinguish between conduct that petitioners endorse and insurance coverage which petitioners are legally required to provide.

b. Petitioners attempt to distinguish *FAIR* on the ground that they are required to subsidize the condemned conduct rather than merely host it, but that distinction can have no legal significance here. As a preliminary matter, there is no basis for distinguishing the economic value of the space provided in *FAIR* from the economic value of the additional insurance coverage at issue here; indeed, the record in this case does not establish what, if any, additional cost to the employer results from including contraceptives in the list of drugs covered by a prescription drug benefit.

Even assuming petitioners subsidize to a constitutionally significant degree the use of medications they oppose, the compelled-subsidy doctrine – like the compelled-speech doctrine – is limited to compelled support for the *expressive* activities of private persons or entities. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005)(explaining that "compelled-subsidy" cases involve situations "in which an individual is required by the government to subsidize a message he disagrees with"); *Keller v. State Bar*, 496 U.S. 1, 14 (1990) (prohibiting compelled financing of political and ideological activity); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977) (same). As discussed above, an employer's

act of providing a health insurance plan to its employees is not an expressive activity. As a result, the compelled-subsidy doctrine, which petitioners attempt to invoke, has no application.

c. Nor does petitioners' claim find support in this Court's cases protecting the right of expressive association. Petitioners attempt to rely on *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (Pet. 17), but that case also has no application here. *Boy Scouts* held that New Jersey could not require a Boy Scout troop to retain a gay scoutmaster without violating the Boy Scouts' First Amendment right of expressive association. *See id.* at 656. Because Dale was open about his sexuality, a leader in his community, and a gay activist, this Court held that "Dale's presence in the Boy Scouts would . . . force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653.

But unlike the public-accommodations law at issue in *Boy Scouts*, the WHWA does not affect petitioners' right to associate for the purpose of speaking, or affect expression in any way. Neither health insurance nor particular prescription drugs contain an inherent message that can interfere with petitioners' expression. The law does not compel or prevent petitioners from associating with anyone, nor do petitioners claim that it does. *Cf. FAIR*, 126 S.Ct. at 1312. Indeed, they have chosen to associate with employees who do not share their faiths and who wish to purchase prescribed contraceptives, despite petitioners' moral disapproval of the practice. The law at issue here neither prevents nor compels that association.

As in *FAIR*, the challenged law leaves petitioners and their associates free to express their disapproval of the condemned conduct. *Cf. FAIR*, 126 S.Ct. at 1312-13. While some deference is due to an association's view of what will interfere with its expression, *see Boy Scouts*, 530 U.S. at 653, petitioners "cannot 'erect a shield'" against application of the WHWA simply by asserting that the statute will "'impair [their] message.'" *FAIR*, 126 S.Ct. at 1312 (quoting *Boy Scouts*, 530 U.S. at 653).

d. Petitioners argue that this Court's review is needed in this case because the WHWA is a unique and unprecedented law. But there is nothing unique or unprecedented about mandated-benefits statutes, which require insurers to provide specific insurance benefits for particular types of insurance contracts. *See, e.g. Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 727-28 (1985) (upholding Massachusetts statute requiring provision of mental health benefits in employee healthcare plans against ERISA preemption challenge).

Rather than seeking a clarification of *Smith*, petitioners seek its wholesale reversal. Their hybrid rights theory stands ready to swallow the free exercise standard of *Smith*, and convert any claimed burden on religious practice – even if based on compliance with a generally applicable law – into a free speech claim subject to strict scrutiny. This was precisely the standard *Smith* rejected. This case presents no reason to revisit *Smith*.

3. In another attempt to carve out an exception to *Smith*, petitioners argue that certiorari is warranted to resolve whether *Smith* applies to *institutions* just as it applies to *individuals*. (Pet. 20-23). This Court has already decided that question, and there is no reason to reconsider it now. The Court has routinely analyzed the application of general

principles of employment law to religious institutions without reference to the doctrine of church autonomy invoked by petitioners. *See Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 306 (1985) (upholding enforcement of Fair Labor Standards Act requirements on a religious foundation without reference to the church autonomy doctrine); *United States v. Lee*, 455 U.S. 252, 259-61 (1982)(considering religious employer's obligation to pay social security taxes for his employees without reference to church autonomy doctrine).

The doctrine petitioners invoke holds that the First Amendment bars courts from adjudicating intrachurch disputes that require judicial determinations on matters of religious doctrine or internal church governance. *See, e.g., Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Jones v. Wolf*, 443 U.S. 595 (1979). But these cases have no application beyond the context of intraorganization disputes. They do not extend to any matter that involves a church entity or which affects a religious organization's labor practices, as petitioners would have it. *See General Council on Fin. & Admin. of the United Methodist Church v. Cal. Superior Court*, 439 U.S. 1369, 1372 (1978) (Rehnquist, J.) (order denying stay). The perceived danger in the church autonomy cases is that "the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs." *Id.* at 1373. Outside the context of internal church disputes, that danger is not present and therefore the doctrine is not applicable. *Id.*

The church autonomy cases cited by petitioners (Pet. 21 & n.13) have no relevance here, as they each involve injecting the State into the churches' decisions about how to resolve matters of religious doctrine. The WHWA does not regulate petitioners' hiring decisions at all; it merely regulates an

employment benefit, much like a minimum wage or social security tax.[7] While petitioners claim they have the right to limit their employees to persons who share their faith and pledge conformity to church teachings (Pet. 22), they have not chosen to do so, and indeed, such a limitation would be one step in qualifying for the religious exemption in the law they challenge.

4. Finally, petitioners argue that certiorari is warranted to correct the state court's alleged error in failing to consider whether the challenged religious infringement was necessary to advance the State's objective, even though the law is neutral and generally applicable. (Pet. 24 & n.17). Petitioners term this supposed error a failure to apply "rational basis review." (Pet. 23-24). They claim that *Smith* should be clarified to hold that even a neutral, generally applicable law that burdens religion must be "rationally designed to promote its legitimate objective." (Pet. 27; *see also* Pet. 23, 24-25). The court below applied *Smith* to the letter, however, and no reconsideration of *Smith* is warranted.

In *Church of the Lukumi Babalu Aye*, 508 U.S. at 531-32, this Court saw no cause to revisit *Smith*'s now well-settled standard, nor have petitioners presented any reason to do so now. The three federal circuit cases they identify as in conflict with this case (*see* Pet. 24 n.17) applied *Smith* correctly, examining only whether the challenged law was neutral and generally applicable. *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649-50 (10th Cir. 2006); *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024,

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7. For the same reason, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), cited by petitioners (Pet. 22), has no relevance to this case. The WHWA does not compel petitioners to negotiate with an employee union.

1032 (9th Cir. 2004); *Fifth Ave. Presbyterian Church v. City of N.Y.*, 293 F.3d 570, 576 (2d Cir. 2002).

The only conflicting decision identified by petitioners is a decision of the Utah Supreme Court, which mistakenly added an additional layer of review, requiring a determination that the challenged statute was rationally related to a legitimate state end. *See State v. Green*, 2007 UT 76, P32-P33 (Utah 2004). That case, however, flatly contradicts the clear holding of *Smith* that if "prohibiting the exercise of religion . . . is not the object of the [challenged law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment [Free Exercise Clause] has not been offended." *Smith*, 494 U.S. at 878. This single decision from Utah does not warrant this Court's review or require additional clarification of *Smith*.

Indeed, the "minimal level of constitutional scrutiny" petitioners seek (Pet. 25) is satisfied where the law applies generally and does not target religion, as required by *Smith*. Petitioners seek to add to *Smith* a requirement of rational basis review with "teeth." (Pet. 25 n.18). But that standard adds nothing to *Smith* and would not change the result here. In both *Romer v. Evans*, 517 U.S. 620, 634 (1996), and *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 450 (1985), cited by petitioners as exemplars of the standard they advocate, this Court invalidated statutes because they were motivated by "animosity" or "irrational prejudice" toward the class of persons affected. But a law motivated by animosity or irrational prejudice toward religion would fare no better under *Smith*. A law targeting religion would lack neutrality and thus would be subject to strict scrutiny, and if motivated by animus or irrational prejudice, it would likely fail that scrutiny.

In any event, there is no cause to revisit the holding of *Smith* in the context of this case, because the court below

applied the standard petitioners now seek when it rejected their parallel state free exercise claim. The state standard requires a showing that the challenged legislation "is an unreasonable interference with religious freedom," balancing the infringement on religious practice against the State's legitimate interest. (Pet. App. 10a). In applying that standard, the court weighed the "substantial" burden the WHWA places on petitioners' religious practices against the State's "substantial" interest in gender equality and women's health. (Pet. App. 13a-14a). The court correctly concluded that while the Legislature might have made another choice in balancing those two interests, it could not say that its choice was an unreasonable interference with petitioners' exercise of their religion. (Pet. App. 14a).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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